Supreme Court, U.S.
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No. 09-395

In The
Supreme Court of the United States

ROY L. HENDRICKS, Administrator, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, OCEAN COUNTY PROSECUTOR'S OFFICE,

Petitioners,

v.

PAUL KAMIENSKI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

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In reply to Respondent's brief in opposition, Petitioners respectfully ask this Court to consider the following points.

Respondent's presentation of his own version of the facts, rather than an examination of the state court's recitation of the facts, demonstrates the State's pivotal point – that habeas review under 28 U.S.C. §2254(d)(1) does not permit de novo examination of the facts to determine a question of law, i.e., whether the state court's opinion was contrary to or involved an unreasonable application of clearly established federal law. Limited review of the facts is permitted only under (d)(2) as circumscribed by the burden of proof in (e)(1), which provides that a prisoner must rebut the presumption of correctness of the state court decision by clear and convincing evidence.

In contrast to Respondent's challenge to the facts, Petitioners have relied upon and discussed the facts as found by the state court solely to demonstrate the Third Circuit's erroneous deprivation of the legitimate inferences from the facts made by the state court and accepted by the district court in favor of the prosecution.

The Third Circuit decided this case exclusively under (d)(1), specifically declining an analysis under (d)(2) and (e)(1). Thus, the State's petition seeks resolution of the only question presented: what is the appropriate standard of review under (d)(1), and what are the distinctions to be made by the courts among

(d)(1), (d)(2), and (e)(1) of 28 U.S.C. §2254 when evaluating habeas claims.

This Court has already signaled its interest in these issues and has acknowledged confusion in the federal courts concerning them. Petitioners know of no other (d)(1) case currently on the Court's calendar, but this case perfectly complements the issues recently presented in *Wood v. Allen*, which is a (d)(2) – (e)(1) case. (*Wood v. Allen*, No. 08-9156, submitted after oral argument on November 4, 2009.) The sufficiency-of-evidence claim here is the broadest of any of the claims made in a habeas case, and a decision granting the writ involves the greatest societal costs, because retrial is barred. The uncertain standard of review under (d)(1), particularly in a sufficiency claim, is ripe for resolution. Should this Court grant certiorari in this case, it could provide a complete resolution of the ambiguities that plague the language of 28 U.S.C. §2254(d)(1), (d)(2) and (e)(1).

Respondent's concession that the conclusions of the district court and state appellate court were in "sharp contrast" with those of the Third Circuit further demonstrates the need for clarification by this Court regarding the appropriateness of an exhaustive de novo review by a federal habeas court under (d)(1), performed many years and levels removed from the jury trial. (Resp.Br.7)

Further, Respondent's claim that the various circuit courts currently apply "essentially" the same standard of review in a sufficiency claim (Resp.Br.35)

is a concession in disguise that there is a lack of uniformity in this area. Respondent's additional argument that certiorari should not be granted because "resolution of this fact-bound issue requires review of the entire 5,000 page trial record" (Resp.Br.30) also demonstrates the same point, that the courts are in great need of guidance as to whether such extensive review is required or even permitted in a sufficiency claim under the narrow design of (d)(1). Indeed, this Court's statements at oral argument in *Wood v. Allen, supra,* reveal concern as to the type and extent of review permitted under the AEDPA.

Notably, Respondent has ignored Petitioners' discussion of the improprieties of the Third Circuit's opinion, in particular its unseemly shifting of the burden of proof to the State, its inappropriate reliance on a prosecutor's remark in summation, and its creation of inferences favorable to the prisoner despite its acknowledgement that he lied under oath to the jury.

Respondent's brief in opposition contains misinterpretations of the record below, of the State's arguments below, and of the petition now seeking certiorari before this Court. For example, as Respondent rewrote Petitioners' "Question Presented," he assumed as fact – although proof of same is not possible – that the state appellate court failed to read the record below but relied solely on the prosecution's factual recitation to reach its conclusion. A reading of the state court's opinion fully dispels this notion.

Only one of Respondent's misinterpretations of the record requires comment. The trial court entered judgments of acquittal on the robbery and murder convictions not because it found the evidence under an accomplice theory was insufficient to sustain them, but rather because the jury's acquittal on conspiracy to rob and murder precluded consideration of that same evidence under an accomplice theory. (Resp.App.3) The trial court's ruling was fully discussed and then reversed by the appellate division, which noted that, notwithstanding its granting of judgment n.o.v., the trial court had found that, "[a]ll of the conduct of defendants Alongi and Kamienski before the afternoon of the 19th is consistent with accomplice liability and the requisite purpose to promote or facilitate the crimes of robbery and murder." (Resp.App.3) The trial prosecutor's comment in summation that there was insufficient evidence to support a conviction on the conspiracy charges has been misconstrued by Respondent as pertaining to the evidence of his guilt under an accomplice theory.

In sum, Respondent is relying on non-evidential material in a sufficiency-of-evidence case, as did the Third Circuit Court of Appeals. Under any standard of review, reliance upon arguments of counsel would be inappropriate in deciding whether a state court unreasonably applied federal law to determine a sufficiency-of-evidence question.

Respondent's brief in opposition argues facts instead of law. Petitioners have posited an urgent

legal issue that is more than ripe for review, and respectfully request that this Court grant certiorari.

Dated: November 13, 2009

Respectfully submitted,

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